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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

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CARLOS GARRIDO,

Defendant.

INTRODUCTION

The government was presented with two challenges in connection with Carlos Garrido's motion: (1) the burden of establishing that the warrantless search of Mr. Garrido's vehicle was conducted pursuant to a valid exception to the warrant requirement of the Fourth Amendment, and (2) the request that the government justify the otherwise improper joinder of two unrelated offenses in the same indictment. The government has failed to respond persuasively to either challenge, and Mr. Carlos Garrido respectfully requests that this court suppress all evidence obtained in the warrantless search of his vehicle and sever the two improperly-joined counts set forth against him.

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ARGUMENT

I. THE GOVERNMENT HAS NOT MET ITS BURDEN OF ESTABLISHING THAT THE SEARCH OF MR. GARRIDO'S VEHICLE WAS CONDUCTED PURSUANT TO A VALID EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT

As a preliminary matter, it is clear that the officers who conducted the warrantless search of Mr. Garrido's vehicle did so with investigatory intent. A plain reading of the incident report generated contemporaneously with the search indicates that the officers drove Mr. Garrido's vehicle to Mission Station with the sole purpose of searching for evidence - without a warrant and in violation of Mr. Garrido's Fourth Amendment rights. The officers searched Mr. Garrido's vehicle after (then) Officer McDonnell observed that "these gang members hide their guns under the dashboard." Incident Report, at 4. The report makes no mention of conducting an inventory search of the vehicle, but instead indicates that after Officer McDonnell's observation and "[d]ue to Mr. Garrido's actions and behavior and the fact that he's an 'MS' member, we drove Garrido's vehicle to Mission Station" and proceeded to conduct a warrantless search. *Id.*, at 5.

An inventory search will not be sustained where the court believes that the officers were searching for incriminating evidence of other offenses. *United States v. Feldman*, 788 F.2d 544, 553 (9th Cir. 1986), citing *South Dakota v. Opperman*, 428 U.S. 364, 376 (1975). In the absence of probable cause for an otherwise warrantless search, an inventory search conducted as a pretext for criminal investigation violates the Fourth Amendment. *United States v. Gray*, 1993 WL 69168, *4 (N.D. Cal. 1993), citing *Feldman*, at 553.

While the government's observation is correct that an inventory search that would otherwise have been conducted need not be invalidated due to a collateral investigative motive (see, *United States v. Bowhay*, 992 F.2d 229 (9th Cir. 1993), the simple invocation of the term "inventory" in response to a Fourth Amendment challenge is not sufficient to remedy what is otherwise a warrantless and illegal search. Instead, when seeking to justify a warrantless vehicle search as a valid inventory search under *Opperman*, the government must demonstrate that the search was conducted both (a) pursuant to an established inventory-search policy that meets the requirements of *Opperman* and (b) "in accordance with the official procedures of the relevant

1 state or local police department." *United States v. Johnson*, 936 F.2d 1082, 1084 (9th Cir. 1991),
2 citing *United States v. Wanless*, 882 F.2d 1459, 1464 (9th Cir. 1989). An inventory search is
3 illegal, and any discovered evidence must be suppressed, when the search does not comply with
4 local inventory search procedures. *United States v. Williams*, 2007 WL 539501 (D. Oregon
5 2007), citing *Wanless*, *Colorado v. Bertine*, 479 U.S. 367 (1987). See, *Wanless*, 882 F.2d at
6 1463 ("to determine whether the evidence secured through the inventory searches of the vehicles
7 in this case is admissible in federal court, we must determine whether the searches were
8 conducted in accordance with the standard procedures [of the local police agency]").

9 Here, the government has successfully established that the San Francisco Police
10 Department did in fact have a written inventory search policy in place. The government fails,
11 however, to meet its burden of proving that the search of Mr. Garrido's vehicle was conducted in
12 sufficient conformity with the established procedures so as to justify the otherwise warrantless
13 and illegal intrusion. When paired with the clear investigative motive for the search, the failure
14 of the officers to follow established impound procedures leads to the conclusion that the search
15 of Mr. Garrido's vehicle amounted not to a standard inventory search prior to impound but
16 instead a simple search for evidence of a crime conducted in the absence of probable cause, in the
17 absence of a warrant, and in violation of the Fourth Amendment.

18 A. *The Officers Did Not Seek Supervisory Approval To Tow Mr. Garrido's Vehicle*

19 The Government devotes significant attention to the fact that SFPD policy mandates that
20 officers tow any vehicle operated by an unlicensed driver. However, despite the various
21 mandatory and permissible grounds by which an officer may order a vehicle towed, General
22 Order 9.06 requires that "[e]xcept when specifically requested by an arrested person, officers
23 shall obtain approval from a supervisory officer before towing a vehicle pursuant to arrest. The
24 reason for the tow and the name of the supervisory officer giving approval shall be included in
25 the incident report." *Id.*, at Section II A-3.

26 Neither the government's opposition, the declaration of Sergeant Dion McDonnell
27 offered in support thereof nor the incident report prepared in connection with the warrantless
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1 search of Mr. Garrido's vehicle sets forth any facts establishing that the arresting officers sought
 2 the requisite supervisory approval before determining that Mr. Garrido's vehicle should be
 3 towed.

4 *B. The Officers Drove Mr. Garrido's Vehicle From The Scene of His Arrest
 In Violation of Established SFPD Policy*

5 Both the incident report prepared contemporaneously with the warrantless search of Mr.
 6 Garrido's vehicle and the declaration filed in support of the government's opposition indicate
 7 that the officers drove Mr. Garrido's vehicle from the scene of his arrest to the SFPD Mission
 8 Station prior to the search. Absent supervisory approval and a few specifically articulated
 9 purposes, this action was in clear contradiction of SFPD's vehicle impound policy. General
 10 Order 9.06 clearly contemplates that vehicles will be towed from the scene of arrest, and
 11 specifically requires that "[o]fficers shall not move a vehicle that is to be towed pursuant to an
 12 arrest unless they have the express permission of a supervisory officer..." *Id.*, at Section II A-5.
 13 The Order further instructs that even with supervisory permission, a vehicle may be moved prior
 14 to a tow for only three specifically articulated reasons:

15 (1) Officer or citizen safety;
 16 (2) The protection of evidence; or
 17 (3) When *in the supervisor's opinion*, further investigation is necessary (emphasis
 18 added)

19 Finally, Section II A-5 requires that officers moving a vehicle prior to a tow specify in the
 20 incident report the reason for the tow, the reason for moving the vehicle from the scene, and the
 21 name of the supervisor giving permission to move the vehicle. *Id.*

22 As noted, the incident report prepared contemporaneously with the warrantless search of
 23 Mr. Garrido's vehicle makes no reference to an impound or inventory search of Mr. Garrido's
 24 vehicle, nor does the report make reference to any supervisory approval to move the car or a
 25 supervisory opinion that further investigation of the vehicle was necessary. The report simply
 26 states that "[d]ue to Garrido's actions and behavior and the fact that he's an 'MS' gang member,
 27 we drove Garrido's vehicle to Mission Station." *Id.*, at 5. Thus, the search of Mr. Garrido's
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1 vehicle clearly fails to conform with the provision of Section II A-5 requiring that the officers
2 document the approval and specified purpose of any movement of a vehicle from the scene of
3 arrest.

4 Due to the absence of any support for a valid inventory search in the contemporaneously-
5 drafted incident report, the government presumably relies on the declaration of Sergeant Dion
6 McDonnell, submitted in support of their opposition, to establish that the officers moved Mr.
7 Garrido's vehicle in conformity with established SFPD procedures. Of course, Sergeant
8 McDonnell cannot, and does not, assert that the movement and subsequent warrantless search of
9 Mr. Garrido's vehicle was documented pursuant to established policy. Instead, the government
10 relies on Sergeant McDonnell for his statement that "either Officer Sanchez or Officer Greiner
11 radioed Sergeant Cota and asked for authorization to move the vehicle, which was granted." *Id.*,
12 at ¶5.

13 This assertion is unsupported by further facts and devoid of evidentiary value. The
14 declaration provides no foundation for any personal knowledge on the part of Sergeant
15 McDonnell as to whether one of the officers did in fact request permission to move the vehicle,
16 from whom such permission was requested, and whether such permission was in fact granted.
17 Indeed, the only fact on this topic that Sergeant McDonnell can competently establish is that he
18 personally did *not* seek the requisite permission to move Mr. Garrido's vehicle. Having failed to
19 establish that the requisite supervisory permission was obtained prior to moving Mr. Garrido's
20 vehicle from the scene of his arrest, the government has also failed in its burden of proving that
21 the warrantless search of the vehicle was conducted in conformance with SFPD's established
22 inventory search policy.

23 *C. The Officers Did Not Observe Established Procedures Regarding Recovery of a*
24 *Firearm During an Inventory Search*

25 Section III B-2 of General Order 9.06 articulates the specific procedures that officers are
26 to follow upon recovery of a firearm from a vehicle in the course of an inventory search. The
27 section provides that upon locating a firearm in connection with an inventory search, the officer
28 is to complete property receipt form "SFPD 315" and book the firearm as "Property for

1 Safekeeping.” Section III B-2 also requires the officer recovering the firearm to complete an
 2 incident report describing the circumstances under which the firearm was recovered. *Id.*

3 It does not appear that the officers conducting the warrantless search of Mr. Garrido’s
 4 vehicle followed any of these procedures. As noted, the incident report describing the
 5 circumstances under which the weapon was recovered does not indicate that it was found during
 6 an inventory of the vehicle prior to impound, but instead clearly suggests that the weapon was
 7 found during a search for the weapon itself. The government has produced no property receipt
 8 form for the weapon, nor is there any indication that the weapon was booked as “Property for
 9 Safekeeping” as would be specifically required had it been recovered during the course of an
 10 inventory prior to impound. Instead, both the contemporaneously-prepared incident report and
 11 Sergeant McDonnell’s declaration assert that custody of the firearm passed immediately to the
 12 Crime Scene Unit, a result inconsistent with an inventory search but entirely consistent with a
 13 search for evidence of a crime conducted without a warrant. As such, the search was illegal and
 14 all evidence obtained as a result of the search must be suppressed. *United States v. Wanless*, 882
 15 F.2d 1463.

16 **II. THE GOVERNMENT HAS NOT PERSUASIVELY REBUTTED MR.
 17 GARRIDO’S ARGUMENT THAT COUNT TWO OF THE INDICTMENT IS
 18 IMPROPERLY AND PREJUDICIALLY JOINED WITH COUNT ONE**

19 In defending its election to set forth two unrelated counts against Mr. Garrido in the same
 20 indictment, the government submits that the charges are connected together because “but for his
 21 arrest in February 2006, Garrido would not have been deported from the United States, and if he
 22 had not been deported from the United States, he would not have been able to commit the later
 23 illegal re-entry crime.” Opposition, at 12. This logic only highlights the impropriety of joining
 24 the two unrelated counts under the same indictment.

25 Rather than being “connected together”, it is clear that the two allegations set forth
 26 against Mr. Garrido are divided by two years and an intervening deportation and are thus not part
 27 of any connected pattern of conduct. The indictment itself makes no attempt to connect these
 28 two disparate allegations. See, *United States v. Terry*, 911 F.2d 272, at 276 (9th Cir. 1990). The

1 fact that a subsequent collateral consequence (deportation) of Mr. Garrido's 2006 arrest is an
2 element of Mr. Garrido's current charge of illegal re-entry fails to support the otherwise improper
3 joinder of the two counts under Rule 8(a). The government's attempt to remedy this clearly
4 flawed indictment by asserting that the two offenses are of the "same or similar character" also
5 fails. Apart from the common question of Mr. Garrido's alienage, the two offenses with which
6 he is charged stem from completely different incidents and will involve two distinct sets of
7 witnesses.

8 The government's reliance on *United States v. Lopez*, 477 F.3d 1110 (9th Cir. 2007) is
9 particularly inapt when the critical distinction between the two cases is observed. *Lopez* involved
10 a single incident whereby the defendant was found in the United States with a weapon and drugs
11 after having been deported. *Id.*, at 1111-1112. The Ninth Circuit upheld denial of the
12 defendant's motion for severance after finding that "[e]ach of the alleged offenses arose from the
13 same act or transaction" and that there was significant overlap in evidence for all charges. *Id.*, at
14 1117. Neither such finding is applicable to the case before the Court. As noted, Mr. Garrido is
15 charged with two separate incidents separated by two full years, with only the relatively
16 straightforward question of alienage in common.

17 Finally, despite the government's concession that possession of a firearm is a
18 comparatively "tame" offense, it remains clear that the counts as currently joined would lead to
19 the introduction of evidence of a handgun allegedly possessed by Mr. Garrido two years ago in
20 his trial on a charge of illegal re-entry, an outcome otherwise precluded by the Federal Rules of
21 Evidence. Similarly, the allegation that Mr. Garrido was deported and returned to the country
22 after allegedly being found with a firearm holds no relevance - and a high risk of prejudice - for
23 the jury that will determine whether he knowingly possessed that weapon prior to deportation. It
24 is of no consequence that courts have tolerated the risks of such prejudice in cases where joinder
25 was otherwise proper under Rule 8(a). Here, the initial joinder is improper, and the prejudice
26 which springs from that impropriety demonstrates not only the logic of the rule permitting
27 severance, but also that of the rule prohibiting improper joinder of offenses in the first instance.

CONCLUSION

For the foregoing reasons, Mr. Garrido respectfully requests that the Court suppress all fruits of the unlawful search of his vehicle. Mr. Garrido further requests that the Court sever Counts One and Two, which have been improperly and prejudicially joined in the indictment filed against him.

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Respectfully submitted,

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/s/

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